

R E M A R K S

In the final office action, dated March 17, 2006, the examiner rejected claims 1, 5, 14, 15, 23, 24, and 26-31 under 35 U.S.C. §102(b) as being anticipated by Rudd, et al., U.S. Patent No. 6,934,915 (Rudd). The examiner rejected claims 2-4, 6-13, 16-22, and 25 under 35 U.S.C. § 103(a) as being obvious over Kloba, et al., WO 01/18688 (Kloba). The examiner also found unpersuasive the declaration filed with applicant's last response for the reasons detailed in section 21 of the office action. Re-examination and reconsideration are requested.

Re the Declaration:

In applicant's last response, dated December 16, 2005, applicant presented evidence, by way of the Rule 131 declaration of Steven G. Henry, the sole inventor, that the invention defined by the claims was actually conceived before the October 9, 2001, filing date of the Rudd patent, followed by a diligent constructive reduction to practice between October 9, 2001, and December 3, 2001, the filing date of the present application. Therefore, the Rudd patent is unavailable as a reference.

In section 21 of the final office action, the examiner found the evidence of the declaration unpersuasive. Applicant respectfully traverses this finding as not supported by law.

The Board of Patent Appeals and Interferences has ruled that factual statements contained in declarations **must** be accepted as true unless the examiner has a reasonable basis for questioning the accuracy of the statements. See, for example, *Ex Parte Gilbert P. Hyatt* (1996 WL 1761844 (Bd. Pat. App & Interf.)):

"If a declarant is stating facts, however, these facts must be accepted as true unless the examiner has a reasonable basis for questioning the accuracy of the statements."

The previously submitted declaration sets forth the following sworn and undisputed facts:

- 1). the date (October 9, 2001) before which the invention was conceived;
- 2). the date (September 6, 2001) on which a draft of the patent application was e-mailed to the inventor for review and comment;
- 3). the date (October 4, 2001) on which the inventor e-mailed comments to the firm of Dahl & Osterloth;
- 4). the date (November 13, 2001) on which a final draft of the patent application was mailed to the inventor; and
- 5). the date (November 28, 2001) on which the inventor executed the patent application and returned it to Dahl & Osterloth.

The statements contained in the declaration are assertions of fact and were made under penalty of perjury. The examiner has provided no basis at all, let alone a reasonable basis, for questioning the accuracy of the statements contained in the declaration. Therefore, the examiner must accept these statements under penalty of perjury as being true under the ruling of *Ex Parte Hyatt, supra*.

In conclusion, the applicant has submitted evidence sufficient to establish conception of the invention prior to October 9, 2001, followed by diligent constructive reduction to practice between October 9, 2001, and December 3, 2001, the filing date of the present application. The evidentiary facts submitted by the applicant have not been challenged. Consequently, Rudd is not available as a reference, and the examiner's rejections successfully traversed.

Applicant believes that all the claims now pending in this patent application are allowable and that all other problems raised by the examiner have been rectified. Therefore, applicant respectfully requests the examiner to reconsider his rejections and grant an early allowance. If any questions or issues remain

to be resolved, the examiner is requested to contact the applicant's attorney at the telephone number listed below.

Respectfully submitted,

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Date: 5-16-06